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IN THE
COURT OF APPEALS OF INDIANA

TROY S. FLICK, JR.,	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 59A05-0701-CV-34
	)	
JAMIE R. FLICK,	)	
	)	
Appellee-Petitioner.	)	

APPEAL FROM THE ORANGE CIRCUIT COURT
The Honorable Larry R. Blanton, Judge
Cause No. 59C01-0210-DR-267

June 22, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Troy Flick ("Father") appeals the trial court's order modifying the custody terms of his dissolution decree ("Modification Order"). Father raises two issues for our review:

1. Whether the court erred when it did not grant Father sole legal custody.

2. Whether the court erred when it modified the parenting time.

We affirm.

FACTS AND PROCEDURAL HISTORY

Father and Jamie R. Alexander ("Mother") were married on September 28, 1996. During their marriage, they had three children. On May 5, 2003, the trial court granted Father and Mother a Summary Decree of Dissolution and approved their dissolution Contract and Agreement. Under that agreement, Father and Mother held joint legal and physical custody of all three children.

On April 25, 2006, Father petitioned the court to modify the dissolution decree and award him "sole legal and physical custody" of the children. Appellant's App. at 22-23. Mother responded by filing her own Petition to Modify, also seeking "sole legal and/or physical custody." Id. at 25. The court held a hearing on November 21, and the parties stated that they had reached an agreement, as follows:

> It's my understanding of the agreement, your Honor, is that [sic], uh, the mother would agree to change custody to the father of the three minor children here, K., D., and R. The father's obligation to pay child support would terminate as of today. The parties agree as of today the father owes Seven Hundred and Twenty Dollars ($720) in child support.

Transcript at 5-6. The parties then discussed and resolved three issues: 1) payment of medical bills; 2) pick-up time for parenting time; and 3) attorney's fees. The court asked Mother's attorney to prepare written findings, which he did.

On December 20, the court signed the Modification Order, which reads, in pertinent part:

> 1. The parties shall have joint legal custody with the father to have primary physical custody of their children, K., D., and R. (See IC 31-9-2-67 LRB [handwritten])[1]
>
> * * *
>
> 6. The former wife shall have visitation in accordance with the Indiana Parenting Time Guidelines with the exception that instead of exercising weekday evening visitation [sic] the former wife shall have the children each Friday evening overnight. This shall reduce travel time on school nights. Thus the former wife shall commence visitations each Friday by picking the children up at school, and said visitations shall continue until Sunday evenings at 6:00 p.m. on her full weekends, and until Saturday at 12:00 noon on the former husband's weekends with the children.

Appellant's App. at 4-5. This appeal ensued.

DISCUSSION AND DECISION

Initially, Mother did not file an appellee's brief. When an appellee fails to submit a brief, we do not undertake the burden of developing appellee's arguments, and we apply a less stringent standard of review, that is, we may reverse if the appellant

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[1] Indiana Code Section 31-9-2-67 reads:

> "Joint legal custody", for purposes of IC 31-17-2-13, IC 31-17-2-14, and IC 31-17-2-15, means that the persons awarded joint custody will share authority and responsibility for the major decisions concerning the child's upbringing, including the child's education, health care, and religious training.

Ind. Code § 31-9-2-67 (West 2004).

establishes prima facie error. Zoller v. Zoller, 858 N.E.2d 124, 126 (Ind. Ct. App. 2006). This rule was established so that we might be relieved of the burden of controverting the arguments advanced in favor of reversal where that burden properly rests with the appellee. Wright v. Wright, 782 N.E.2d 363, 366 (Ind. Ct. App. 2002). Generally, we review custody modifications for an abuse of discretion with a preference for granting latitude and deference to our trial judges in family law matters. Apter v. Ross, 781 N.E.2d 744, 758 (Ind. Ct. App. 2003).

Issue One: Change in Custody

Father argues that the trial court's Modification Order does not represent the parties' agreement to give Father sole legal custody. Father supports his argument by citing to Mother's "pleading stating that she was no longer contesting FATHER's Petition to Modify," and to her testimony to show that Mother agreed Father was to have sole legal custody. Appellant's Brief at 13. But no such pleading appears in the Appendix,[2] and Mother did not testify at the hearing.

The record simply does not support Father's claim. As noted above, both parties requested sole legal custody in their respective motions, but at the hearing, the parties never specified what type of custody Mother "would agree to change." Transcript at 6. Mother submitted the proposed modification order as requested by the court on the

[2] Although in his letter to the court dated December 18, 2006, Father refers to "[Mother]'s original pleading stating that she does not contest the Respondent's request for modification of custody," that pleading is not included in the Appendix. App. at 53. Further, according to the Chronological Summary of Filings and Proceedings, Mother filed no such pleading.

hearing date. Neither party, however, filed any relevant pleadings[3] before the court issued its corresponding order. Both parties, however, sent letters to the court stating their position. Not surprisingly, Mother claimed in her letter that the Order reflects the agreement, while Father argued that it did not and Mother agreed to him having sole legal custody.

Under Indiana Code Section 31-17-2-21, a court may not modify a child custody order that granted joint legal custody unless it makes two specific findings: 1) the modification is in the best interests of the child; and 2) since it originally determined custody, there has been a substantial change in one or more of the relevant factors. Apter, 781 N.E.2d at 758. The party seeking modification bears the burden of demonstrating that custody should be altered. Id. Here, neither party submitted evidence or proposed findings to support a change in joint legal custody because they reached an agreement.

In essence, Father asks us to determine that the court incorrectly interpreted the parties' agreement. Even if the parties did agree that Father should have sole legal custody, however, the court is not bound by such an agreement. "When custody, support, or visitation issues are being determined, the best interests of the child are the primary consideration." Beaman v. Beaman, 844 N.E.2d 525, (Ind. Ct. App. 2006) (quoting In re Paternity of K.J.L., 725 N.E.2d 155, 158 (Ind. Ct. App. 2000)). The trial court retains the duty to determine if any agreement is in the children's best interests although courts should carefully consider the parents' wishes. Id. Thus, no agreement

[3] On December 18, 2006, Father filed his "Verified Notice Of Intent To Relocate Pursuant To Indiana Code 31-12-2.2." App. at 3.

between parties that affects child custody, support, and parenting time issues is automatically binding upon the trial court. Id. The court could reject a parties' agreement as not in the best interests of a child if the agreement is ambiguous or unworkable. Id.

Here, the specific type of custody the parties agreed to change at the hearing was not defined. Also, during the hearing, the court stated:

> You're never gonna [sic] be able to change the fact that you are the parents of these children. They don't got a dog in this hunt. And they don't deserve to be pulled and tugged by either one of you. Time to quit it. And I'm . . . you know it's, [sic] it's not a good thing that we've been in here at least once a year since the year, [sic] 2002.

Transcript at 15. If, in fact, the parties had agreed to give Father sole legal custody—a proposition unsupported by the record—the court could have altered that agreement after determining the agreement was unworkable or not in the best interests of the children. Both the court's comments during the hearing and its citation to Indiana Code Section 31-9-2-67, which defines "joint legal custody," support the conclusion that the court deliberately continued joint legal custody.

Father appears to argue that Mother changed the terms of their agreement when she submitted the Modified Order. But no matter who drafted the proposed order, trial courts have the discretion to adopt a party's proposed judgment as their own. Scoleri v. Scoleri, 766 N.E.2d 1211, 122 n.6 (Ind. Ct. App. 2002). We will reverse such judgment only if it is clearly erroneous, which means that the record must lack probative evidence or reasonable inferences from the evidence to support it. Id. at 1215. On this record, we cannot say that the Modified Order does not reflect the parties' agreement. Thus, it is

not clearly erroneous, and the court did not abuse its discretion when it determined that Father and Mother should continue to have joint legal custody.

Issue Two: Parenting Time

The record also does not support Father's second argument that the trial court erred when it modified the parties' parenting time. At the hearing, the parties discussed parenting time as follows:

> [Father]: And then there's one other, one other issue, your Honor, on the exchange. In chambers we had discussed and your proposed Friday [sic], or they proposed Friday after school until Saturday at noon, and we would ask that, that be Friday at 6:00 so he has a chance to pick the boys up and pack them, give them supplies for the weekend, clothes and things like that, and that she pick 'em [sic] up Friday at 6:00 and then keep them until Saturday at 2:00.
>
> The Court: What kind of supplies?
>
> [Father]: Well, obviously they have medical supplies, they have clothes, homework [sic].
>
> The Court: No, she's not gonna pay support, she can have weekend clothes and stuff for the kids.
>
> [Father]: Okay.
>
> The Court: You don't . . . just when, when they go to school, they can go to her house with the clothes they got on, she'll send the kids back and the clothes that they wear will be clean and you'll have stuff there for them to, to play in and carry on with. Kids don't need to be dressed up on the weekends anyway, right? Right.
>
> [Father]: And there is an issue, your Honor, that the, uh, at least the two older boys, I think, play football and we'd like a requirement that she take them to their activities if they have games or practices.
>
> The Court: Oh, that's . . . she's got to.

[Mother]: She would agree to that.

[Father]: Okay.

Transcript at 10-11.

The court's Modification Order on that point reads:

> 6. The former wife shall have visitation in accordance with the Indiana Parenting Time Guidelines with the exception that instead of exercising weekday evening visitation [sic] the former wife shall have the children each Friday evening overnight. This shall reduce travel time on school nights. Thus the former wife shall commence visitations each Friday by picking the children up at school, and said visitations shall continue until Sunday evenings at 6:00 p.m. on her full weekends, and until Saturday at 12:00 noon on the former husband's weekends with the children.

Appellant's App. at 4-5.

Father argues on appeal that the court erroneously applied the after-school-pick-up time to every Friday when "MOTHER did not contest the establishment of her parenting time rights to begin on alternating Friday evenings . . . ." Appellant's Brief at 16. Again, Father essentially argues that the court got the terms of the parties' agreement wrong. And, again, we are faced with an ambiguity in the parties' agreement.

During the hearing, the parties did not differentiate between the Fridays of Mother's weekends and the Fridays substituting for the weekday evening parenting time. And Father neither objected nor attempted to clarify but, rather, agreed with the court's proposed resolution. The Modification Order accurately reflects that discussion, and the trial court acted within its discretion by granting the agreed-upon modification.

Affirmed.

RILEY, J., and BARNES, J., concur.